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In The

Supreme Court of the United States

THE GOOD NEWS CLUB, ANDREA FOURNIER, AND DARLEEN FOURNIER,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF WALLBUILDERS, INC.
in support of the *Petitioner*

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INTEREST OF AMICUS[1]

Amicus curiae WallBuilders, Inc. is a 501c (3) organization that is dedicated to the restoration of the moral and religious foundation on which America was built. As such, the organization has a direct interest in seeing that the relationship between government and its citizens is set on a sound constitutional basis in matters of religious liberty.

SUMMARY OF ARGUMENT

The Second Circuit's forum analysis in the instant case is fundamentally flawed. Through general confusion of forum terminology or through the Second circuits limited forum paradigm or through both, the Second Circuit generally applies and applied in this case the wrong standards to the wrong fora. Specifically, the Second Circuit applied non-public forum standards to a designated forum. This error was compounded because the Second Circuit has also implicitly introduced another type of discrimination into its forum analysis: "purpose discrimination." This unacknowledged factor, rather than serving a salutary function, incorporates additional

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of Court. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel.

errors into the Second Circuit's already problematic forum analysis.

The concept of "purpose discrimination" is a misapplication of legitimate questions about purpose which may be raised in proper forum analysis. Schools, such as Respondent in this case can use "purpose discrimination" as an end run around strict scrutiny in a designated forum and around viewpoint discrimination in a non-public forum. Amicus asks this Court to correct the Second Circuit's aberrant forum analysis and reverse the Second Circuit's decision.

ARGUMENT

I. INTRODUCTION

The Second Circuit Court of Appeals held that the forum created by the Milford Central School (Milford) was a limited forum and that, therefore, the restrictions that Milford has placed on speech in its forum "will withstand First Amendment challenge if they are reasonable and viewpoint neutral." *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 508 (2d Cir. 2000). Thus, it is understandable that the parties should concentrate their arguments on viewpoint neutrality.

However, Amicus believes that the already murky issue of forum analysis will be further obfuscated if certain problems with both Milford's policy and the Second Circuit's forum analysis in this case are not met head on. It is the goal of this brief to point out these problems.

II. THE SECOND CIRCUIT'S ANALYSIS IN THIS CASE IS FLAWED BY FORUM TERMINOLOGY CONFUSION

First, the Second Circuit participated in confusion in forum terminology. See *Good News Club* 202 F.3d at 508-10. This Court has traditionally used a tripartite forum classification system. Under this system a forum is categorized as a traditional public forum, a designed public forum, or a non-public forum. *See, e.g., Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 802-03 (1985). However, a designated public forum may be opened to the public at large or for particular speakers or for particular subject matters. *Id.* Finally, the term "limited public forum" can be used as a synonym for a designated public forum, as in the *Cornelius* Court's discussion of the Respondent's characterization of the forum at issue in that case. *Id.* at 804. However, the term "limited public forum" can be used as a synonym for a non-public forum. That is how this Court used the term in *Rosenberger v. Rectors & Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995), in its description of *Cornelius'* non-public forum.

A. Terminological Confusion Can Lead to Applying the Wrong Standards to Fora

Thus, it is all too easy to apply the "reasonable and viewpoint neutral" test to fora to which it is inapplicable. This standard is applicable to so-called limited fora which are actually non-public fora, but not necessarily to limited fora which are designated public fora.

This can be illustrated by imagining that the case of *Widmar v. Vincent*, 454 U.S. 263 (1981) had arisen in the Second Circuit instead of the Eight Circuit and that it had arisen after *Cornelius* and *Rosenberger* rather than before them. The Widmar forum could be described as a limited public forum under *Cornelius'* use of the term. The rule for a limited public forum in *Rosenberger* is the reasonable and viewpoint neutral test. Thus, by ignoring the fact that the single term "limited public forum" can describe two completely different types of fora, the Second Circuit could have ruled in *Widmar* that the restriction against the student group was reasonable and viewpoint neutral. The restriction could have stood up under such a standard. However, such an oversight would have stood First Amendment principle on their heads. This Court held that the applicable standard in *Widmar* was strict scrutiny, requiring the university "to show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." 454 U.S. at 270.

B. This Confusion Led the Second Circuit to Apply the Wrong Standards to Milford's Forum

In light of this illustration, how do we know that the Second Circuit's analysis in the instant case did not partake of exactly this error? Amicus believes that the Second Circuit did, in fact, apply the rule for one type of limited forum (*i.e.*, the non-public forum) to the other type of limited forum (*i.e.*, the designated public forum).

This error can be seen by examining what the Second Circuit wrote in its discussion of Milford's "limited forum." After delineating the tripartite forum

categories, the Second Circuit made short shrift of the rest of the analysis:

> Limited public forums are those that the government has designated as a "place. . . of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Bronx Household of Faith*, 127 F.3d at 211 (quotation omitted). We have previously held on a number of occasions that N.Y. Education Law § 414 and policies promulgated thereunder create limited public forums. *See, e.g., Full Gospel Tabernacle v. Community Sch. Dist. 27*, 164 F.3d 829, 829 (2d Cir. 1999) (*per curiam*), *aff'g* 979 F. Supp. 214, 220 (S.D.N.Y. 1997); *Bronx Household of Faith*, 127 F.3d at 215; *Deeper Life Christian Fellowship, Inc. v. Board of Educ., ("Deeper Life I")* 852 F.2d 676, 680 (2d Cir. 1988). Milford's Community Use Policy specifies who may use school facilities, when, and for what purposes. The parties agree, as they did in the court below, that the Milford school has created a limited public forum. In light of our precedent, the district court's conclusion, and the parties' agreement, we think it clear that the Community Use Policy has created a limited public forum in the Milford school facilities.
>
> Restrictions on speech in a limited public forum will withstand First

> Amendment challenge if they are reasonable and viewpoint neutral. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829-30, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995); *Bronx Household of Faith*, 127 F.3d at 214.

Good News Club v. Milford Cent. Sch., 202 F.3d 502, 508-09 (footnote omitted).[2]

This quotation makes it clear that the Second Circuit is applying the non-public forum standard to the restrictions in the instant case. This is only appropriate if its determination that the forum is a limited forum means that the forum is a non-public forum. If, in fact, the determination that the forum is a limited forum actually means that the forum is a designated public forum, then the Second Circuit has made exactly the mistake pointed out by our *Widmar* hypothetical.

We should, therefore, consider which type of forum the Second Circuit actually considered the Milford policy to create. The Second Circuit cited three sources for its conclusion that the forum was a "limited forum": "precedent, the district court's conclusion, and the parties'

[2] Here and hereafter, most of the citations in this brief's case quotations have been left in, even though this necessarily lengthens the quotations. The reason is simple. Because of the nature of the argument made in this brief, Amicus believes it will help this Court to see how the Second Circuit and the New York district courts have used (or misused) forum cases.

agreement." *Good News*, 202 F.3d at 509. Because the district court relied on many of the same cases as the Second Circuit, it is helpful to consider these two sources together. Once we have sorted out these matters, it will become obvious that the parties' agreement that Milford's forum is a "limited" one cannot control what standard controls the restrictions at issue.

The discussion of limited fora by the district court is most informative, especially since the Second Circuit embraced it by reference. Here one can see the indiscriminate mixing of non-public forum and designated public forum standards and analyses:[3]

> "Limited public forums are 'created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.'" *Bronx Household*, 127 F.3d at 211 (quoting *Cornelius*, 473 U.S. at 802). When a state opens a forum to the general public, the state is "bound by the same standards as apply in a traditional public forum."

[3] As noted previously, Amicus has deliberately left case citations in most quotations because it believes that this Court needs to see how the cases have been used. The same rationale underlies the inclusion of quotations such as this one which could otherwise be summarized in a few succinct sentences. That, however, would not allow this Court to see the mixing and matching of concepts and misapplication of cases that Amicus seeks to demonstrate.

Perry, 460 U.S. at 46. Accordingly, while the First Amendment permits reasonable time, place, and manner regulations, it forbids the state to enforce content-based exclusions unless narrowly drawn to serve a compelling state interest. *See id.*; *Travis*, 927 F.2d at 692.

The State "is not required to indefinitely retain the open character" of a limited public forum, however, *Perry*, 460 U.S. at 46, and an entity such as a school district is entitled, as is a private owner of property, to "preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel*, 508 U.S. at 390. A state may therefore designate a forum as public "but limit[] the expressive activity to certain kinds of speakers or to the discussion of certain subjects." *Travis*, 927 F.2d at 692; *see also Rosenberger*, 515 U.S. at 829 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created justify the State in reserving it for certain groups or for the discussion of certain topics."); *Perry*, 460 U.S. at 49 ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access based on the basis of the subject matter and speaker identity."). Such content-based limitations are permissible to the extent that they preserve the purposes of the limited forum and are viewpoint neutral. *Rosenberger*, 515 U.S.

at 829-30; *Lamb's Chapel*, 508 U.S. at 393; *Bronx Household*, 127 F.3d at 211 ("Restrictions on access based on speaker identity and subject matter are permissible only if 'the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'") (quoting *Cornelius*, 473 U.S. at 806).

As to those specified uses for which such property *is* designated a public forum, the same First Amendment protections accorded traditional public forums apply. *See Perry*, 460 U.S. at 46; *Calash v. City of Bridgeport*, 788 F.2d 80, 82 (2d Cir. 1986). In other words, constitutional protection in a limited public forum is afforded only to "expressive activity of a genre similar to those that government has admitted to the limited public forum." *Travis*, 927 F.2d at 692 ("The government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre."). Therefore, to succeed, plaintiffs must establish that the District's use policies "created a limited public forum intended to benefit . . . organizations such as [Good News] and encompassing the purposes for which the organization seeks to use the school property," *Deeper Life*, 852 F.2d at 680, and permitted similar organizations to use

the school facilities for similar purposes. *See Bronx Household*, 127 F.3d at 214.

Good News Club v. Milford Central Sch., 21 F. Supp. 2d 147, 153 (N.D.N.Y. 1998).

In this approach by the district court, one can see two things. First, the district court appears to make exactly the kind of mistake we have described in the *Widmar* hypothetical. After using the term "limited" to describe a designated public forum, the district court then invokes the non-public forum "reasonable and viewpoint neutral" standard.

III. THE SECOND CIRCUIT'S ANALYSIS IN THIS CASE IS FLAWED BY PARADIGM CONFUSION

Second, the district court is—without acknowledging it—also using the Second Circuit's paradigm of the limited public forum as a subset of designated public forums. This approach is explicitly discussed in cases such as *Full Gospel Tabernacle v. Community School District 27*, 979 F. Supp. 214 (S.D.N.Y 1997) and *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, (2d Cir. 1988). For example, in *Full Gospel*, the court explained the limited public forum this way:

> In addition, the Second Circuit has recognized a sub-set of designated public forums termed limited public forums. *See, e.g., Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 679 (2d Cir. 1988). This sub-category includes property designated by the government for use by certain groups or for the discussion of certain subjects. *Perry*, 460 U.S. at 46 n.7; *Cornelius*, 473 U.S. at 802. As to those particular groups and subjects, the forum is an open one, and any regulation based on content must be narrowly tailored to serve a compelling government interest. *Perry*, 460 U.S. at 46. However, "under the limited public forum analysis, property remains a nonpublic forum as to all unspecified uses, and exclusion of uses—even if based upon subject matter or the speaker's identity—need only be reasonable and viewpoint-neutral to pass constitutional muster." *Deeper Life*, 852 F.2d at 679-80 (citations omitted). "Where the proposed use falls outside of the limited forum, the State is subject to only minimal constitutional scrutiny." *Bronx Household of Faith*, 127 F.3d 207, 1997 WL 567035, at *3 (citations and internal quotations omitted).

Full Gospel, 979 F. Supp. at 218-19.

This particular articulation of this paradigm does not sound that bad. At least the *Widmar* hypothetical would probably have been decided correctly. However, the fine points are often lost. For example, in *Bronx Household* one finds the following discussion:

Limited public forums are "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802; *see also Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991). But restrictions on access based on speaker identity and subject matter are permissible only if "the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806 (citing *Perry Educ. Ass'n*, 460 U.S. at 49). Where the proposed use falls outside of the limited forum, "the State is subject to only minimal constitutional scrutiny." *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 229 (2d Cir. 1996).

> A nonpublic forum is government property that has not been opened for public speech either by tradition or by designation. *See Perry*, 460 U.S. at 46. In such a forum, the government may make "distinctions in access on the basis of subject matter and speaker identity." *Id.* at 49.

Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207, 211-12 (2d Cir. 1997). Gone is all mention of strict scrutiny in a designated forum.

Thus, the district court—and by adoption, the Second Circuit—used the limited-forum-as-sub-set-

paradigm or participated in general terminological confusion or both. In any event, it seems clear that both courts did engage in the *Widmar* hypothetical error.

IV. THE SECOND CIRCUIT HAS FURTHER CONFUSED FORUM ANALYSIS BY INTRODUCING "PURPOSE DISCRIMINATION"

Furthermore, a second problem remains to be addressed. And again the problem exists whether it is created by the limited-forum-as-sub-set-paradigm or general terminological confusion or both. The second problem, which arises from the first, is that the concept of purpose is intruded into the court's forum analysis in an inappropriate way.

In effect, the confusion becomes two-fold. First, fora that are in reality designated public fora are identified as non-public fora. In the worst cases, the strict scrutiny standard is completely lost. Second, a new type of discrimination occurs. This discrimination is not recognized and thus is not evaluated. One can call this new discrimination, "purpose discrimination."

Perhaps it is the sensed, yet unidentified, influence of this factor that has led some jurists to express the difficulty involved in forum analysis. For example in the instant case, Judge Jacobs in dissent wrote, "[W]hen the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters." *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 512 (Jacobs, J., dissenting). As this brief hopes to illustrate below, the quixotic nature of this endeavor is made even more difficult when "purpose discrimination" clouds the picture.

To try to understand how the false concept of "purpose discrimination" has crept into the Second Circuit's jurisprudence and into Milford's policy, one can look at two matters. First, one can examine the proper role of purpose in forum analysis. Then one can compare this to what the Second Circuit and Milford have done with purpose.

A. The Role of Purpose in Proper Forum Analysis

Purpose plays two roles in proper forum analysis. First, an examination of purpose may be required to determine what type of forum exists. The inquiry here is into what the intended purpose of the property (or other forum) is. However, the inquiry into purpose is really an inquiry into the nature of the forum, not into self-serving statements as to the only acceptable purposes for the forum. After all, the point of forum analysis is to help the courts balance the interest of the government property owner in limiting the forum's purpose as it sees fit with the interest in the individual or organization in using the property for *other* purposes. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). In this sense, purpose is an issue totally separate from subject matter discrimination, speaker identity discrimination, or viewpoint discrimination. Thus, in *Cornelius*, much of this Court's discussion of purpose was aimed at ascertaining the type of forum that the Combined Federal Campaign constituted. *Id.* at 803-06.

Purpose has a second legitimate place in a proper forum analysis. After the determination of the forum type, purpose will be looked at again *if the forum turned out to be a non-public forum*. In such a non-public

forum, "[i]n addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 46. Therefore, if a court has determined that a forum is a non-public forum, it may examine whether the purpose of the forum renders the regulation reasonable.

B. The Erroneous Role of Purpose in the Second Circuit's Aberrant Forum Analysis

All of this is a far cry from what the Second Circuit has done. By interjecting purpose into the discussion of "limited" fora, even if a "limited" forum is actually a designated forum, another layer of confusion has been added. Thus, under the Second Circuit's forum analysis, schools, such as Milford, can now engage in "purpose discrimination."

This is especially problematic in that "purpose" is now used with an entirely different meaning than the one that word had when it was used to establish the original forum analysis. As noted above, in proper forum analysis, purpose is related to the nature of the forum. Thus, for example, in *Cornelius*, this Court discussed whether the purpose of the forum was to increase expressive activity or decrease expressive activity. 473 U.S. at 803-06. Similarly, this Court discussed whether the purpose of the forum was to increase workplace disruption or to decrease workplace disruption. *Id.* This use of the word "purpose" is vastly different from how Milford uses the term.

Milford uses the term "purpose" to discriminate against activities that it cannot legitimately discriminate against on any other grounds. For example, Milford could not prevent discrimination against the Good News Club on the basis of speaker identity because the policy opens the forum to community groups such as the Club. *See* Milford Central School's Policy of Community Use of School Facilities. Milford cannot discriminate against the Club on the basis of subject matter under a proper approach to forum analysis since nowhere does the policy exclude either morality or religion as a *topic of discussion*. *Id*. Indeed, the *topic* of religion is surely permitted under those parts of the policy which allow "instruction in any branch of education, learning or the arts" and "uses pertaining to the welfare of the community." *Id*. Milford cannot discriminate against the Club on the basis of viewpoint under *Lamb's Chapel v. Center Moriches School District*, 515 U.S. 384 (1993). Rather, Milford attempts to discriminate against the Club based on its "religious *purpose*."

Milford attempts to use this self-serving new type of discrimination as a trump card. But this Court should not allow this misuse of the word "purpose" to forestall proper analysis. After all, as noted above, the very reason for resorting to forum analysis at all is to determine whether citizens can use government property for expressive activities that the government property owner seeks to squelch. *Cornelius,* 473 U.S. at 800. It is no analysis at all to say that, because the government asserts that no religious purpose can be carried out on its property, indeed no religious purpose can be carried out. This Court should instead use the word "purpose" as it always has. Was Milford's purpose to encourage or discourage expressive activity? Was Milford's purpose

to accommodate and facilitate community groups or to make it difficult for them to access school property? Was Milford's purpose to create a wide ranging community forum or a very narrow forum?

The purposes of Milford's policy are plain on its face. The answer to every question posed above cuts in the Club's favor. In addition, the policy also legitimately encompasses the purpose of avoiding disruption to normal school operation. Milford Central School's Policy of Community Use of School Facilities. The Club's desired use poses no problem on this front. Thus, the only "purpose" that can stand in conflict with the Club's requested use, is the putative "purpose discrimination" trump card. But that "purpose" is not really a purpose at all.

V. "PURPOSE DISCRIMINATION" CAN SERVE AS AN END RUN AROUND STRICT SCRUTINY AND AROUND VIEWPOINT DISCRIMINATION

Two implications are implicit in the above discussion. First, the Second Circuit may have erred in its characterization of Milford's forum. Since it decided that Milford had created a "limited" forum, it may have meant a non-public forum or it may have meant a designated forum. If the Second Circuit meant that Milford's forum was a non-public forum, Amicus contends that it erred. In light of its policy and after removing the confusion created by terminology and the "purpose discrimination" trump card, Amicus believes that Milford's forum is surely a designated public forum. Therefore, "purpose discrimination" must not be allowed to blind this Court's analysis. This Court should apply strict scrutiny to Milford's exclusion of the Club just as

this Court applied strict scrutiny to the exclusion of the student organization in *Widmar v. Vincent*, 454 U.S. 263 (1981). "Purpose discrimination" cannot serve as an end run around strict scrutiny.

The second implication is that "purpose discrimination" cannot serve as an end run around viewpoint discrimination either. Thus, even should this Court disagree with amicus and believe that Milford created a non-pubic forum or should this Court examine the exclusion of the Club without a determination of what type of forum existed, "purpose discrimination" must still be seen through. In this context, purpose discrimination serves as a disguise for viewpoint discrimination. Purpose discrimination would allow Milford to claim that it is not engaging in viewpoint discrimination. After all, the argument goes, Milford actually allows a religious viewpoint on many subjects. It is not the Club's religious viewpoint that is the problem; it is its religious purpose.

However, while Milford may allow a religious viewpoint on some topics, it certainly does not allow a religious viewpoint on religion, which is an otherwise allowable subject. Thus, under the policy provisions which allow "instruction in any branch of education, learning or the arts" and "uses pertaining to the welfare of the community," Milford Central School's Policy of Community Use of School Facilities, religion could be discussed from a sociological, anthropological, historical, or other academic viewpoint, but not from a religious viewpoint. After all, a religious viewpoint on religion may involve a devotional response, as well as living out the precepts of the religion under discussion

and teaching them to the next generation.[4] And this is exactly what Milford objected to. They did not want the Club to engage in Scripture memorization or worship or evangelistic Bible lessons on school premises. *Good News Club v. Milford Cent. Sch.*, 21 F. Supp. 2d 147, 152 (quoting a letter from Milford's Superintendent McGruder). Thus, at a minimum, "purpose discrimination" served as a disguise for discriminating against a religious viewpoint on the otherwise includable subject of religion.

This Court should identify the erroneous elements that have crept into the Second Circuit's forum analysis and clarify how forum analysis should be undertaken. Amicus believes that, having done so, this Court will conclude that Milford cannot open its forum to the degree that it has and yet limit religion's access to viewpoint on subjects that Milford considers to be secular enough. Whether this Court decides that Milford's limited forum is a designated public forum or a non-public forum or declines to rule on the forum type, Milford cannot engage in "purpose discrimination." The Second Circuit has used "purpose" to mean something totally other than what it means in proper forum analysis. For schools that want to be hostile to religion, the Second Circuit has created an unassailable hiding place. It has also led astray those schools that are just trying to do the right thing.

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[4] Amicus also draws the Court's attention to the similar, though different, argument about excluding the religious viewpoint on morals and character made by the Club its Petition for Writ of Certiorari at 10-13.